Supreme Court, U.S.
FILED
FEB 23 1993
OFFICE OF THE CLERK

No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT LEE AND ANGELA LEE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

---

PETITION FOR WRIT OF CERTIORARI

---

*LARRY L. SIMMS
BRADFORD R. CLARK
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8558

JOHN R. WESTERMAN
TODD M. ACKLEY
LAW OFFICES OF JOHN R. WESTERMAN, Chartered
2901 East 20th Street
Farmington, New Mexico 87402
(505) 327-3737

Attorneys for Petitioners

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

A provision of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2765(a), prohibits the bringing of a civil action against the Government for allegedly tortious conduct of a government employee unless the plaintiff has first presented the claim to the appropriate federal agency. Another provision of the FTCA, 28 U.S.C. § 2401(b), bars a tort claim against the United States unless that claim is presented to the appropriate federal agency within two years of its accrual. By regulation, a tort claim presented within two years may be amended "at any time prior to final [agency] action" on that claim. Petitioner Angela Lee timely filed a claim on behalf of her injured child that identified the occurrence said to have involved tortious conduct by government employees and that placed a monetary value on damages suffered as a result of that tortious conduct. More than two years after the commission of the allegedly tortious conduct but before the agency acted on that claim, petitioners filed an amendment to the original claim by which they notified the Government that they had suffered injuries personal to each of them arising out of the tortious conduct that had caused injury to their child. On these undisputed facts, petitioners present two questions for review on which there is a clear conflict, expressly acknowledged by the courts below, among the federal courts of appeals:

1. Should 28 U.S.C. § 2401(b) be interpreted to preclude the amendment of a tort claim timely filed with the appropriate federal agency where the amendment arises directly from the same transaction or occurrence that gave rise to the claim and the amendment is filed prior to final agency action on the claim?

2. In enacting § 2401(b) in connection with imposing on tort claimants a requirement that they exhaust administrative remedies before filing a tort claim against the United States, did Congress, expressly or impliedly, preclude application of the rule, familiar to all judicial proceedings in federal courts by virtue of Fed. R. Civ. P. 15(c), that an amendment to a complaint properly relates back if the initial claim gives the defendant adequate notice of the potential for assertion of the amended claim and the defendant suffers no prejudice by the amendment?

PARTIES

Angela Lee, Petitioner

Robert Lee, Petitioner

United States of America, Respondent

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
APPLICABLE STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	4
A. Proceedings Before the Department of Health and Human Resources	4
B. Proceedings in the District Court	5
C. Proceedings in the Court of Appeals	7
REASONS FOR GRANTING THE WRIT	7
A. The Tenth Circuit's Decision and Judgment Present a Clear Conflict with the Ninth Circuit's Decision and Judgment in *Avila* v. *United States*	7
B. The Inter-circuit Conflict Involves a Substantial Point of Law That This Court Would Most Probably Conclude Was Wrongly Decided by the Tenth Circuit	12
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Adams v. *United States*, 615 F.2d 284 (5th Cir. 1980) 16,18,19

Avery v. *United States*, 680 F.2d 608 (9th Cir. 1982) 11,18

Avila v. *Immigration and Naturalization Service*, 731 F.2d 616 (9th Cir. 1984) ..... *passim*

Douglas v. *United States*, 658 F.2d 445 (6th Cir. 1981) 17

Manko v. *United States*, 830 F.2d 831 (8th Cir. 1988) ..... *passim*

McNeil v. *United States*, No. 92-6033 (*cert. granted*, January 15, 1993) 8

Odin v. *United States*, 656 F.2d 798 (D.C. Cir. 1981) 12,15,17

Train v. *City of New York*, 420 U.S. 35 (1975) ... 16

Tucker v. *United States Postal Service*, 676 F.2d 954 (3d Cir. 1982) 17

United States v. *Kubrick*, 444 U.S. 111 (1979) 7

Warren v. *U.S. Department of the Interior*, 724 F.2d 776 (9th Cir. 1984) (*en banc*) 17

STATUTES AND REGULATIONS:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1346(b) 2

28 U.S.C. § 2401(b) ..... *passim*

28 U.S.C. § 2672 16,17

28 U.S.C. § 2675(a) ..... *passim*

28 C.F.R. § 14.2(c) 8

45 C.F.R. § 35.2 3,9,14

Fed. R. Civ. P. 15(c) 9,13

Table of Authorities Continued

Page

MISCELLANEOUS:

S. Rep. No. 1327, 89th Cong., 2d Sess. (1966) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT LEE and ANGELA LEE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

---

Petitioners Robert and Angela Lee respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on November 25, 1992 and to resolve the inter-circuit conflict arising from that judgment.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 980 F.2d 1337 and is reprinted in the Appendix, *infra*, at 1a-4a. The opinion of the District Court is unreported but is attached as Appendix A to the Tenth Circuit's reported opinion, 980 F.2d 1339, and is reprinted in the Appendix, *infra*, at 5a-10a. The letter of the Department of Health and Human Services denying petitioners' attempt to amend the original claim is reprinted in the Appendix, *infra*, at 11a.

JURISDICTION

Petitioners seek review of a decision of the Court of Appeals issued November 25, 1992. The District Court had jurisdiction over this case under 28 U.S.C. § 1346(b). Jurisdiction over this case is conferred upon this Court by 28 U.S.C. § 1254(1).

APPLICABLE STATUTES AND REGULATIONS

1. Section 2401(b) of title 28, *United States Code*, reads as follows:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

2. Section 2675(a) of title 28, *United States Code*, reads in pertinent part as follows:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury of death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of any agency to make final disposition of a claim within

> six months after it is filed shall, at the option of the claimant anytime thereafter, be deemed a final denial of the claim for purposes of this section. . . .

3. Section 35 of title 45, *Code of Federal Regulations*, reads in pertinent part as follows:

§ 35.2 Administrative claim; when presented; place of filing.

> (a) For purposes of the regulations in this part, a claim shall be deemed to have been presented when the Department of Health and Human Services receives, at a place designated in paragraph (b) of this section, an executed Standard Form 95 or other written notification of an incident accompanied by a claim for money damages in a sum certain for damage to or loss of property, for personal injury, or for death, alleged to have occurred by reason of the incident. . . .
>
> (b) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final action by the Department Claims Officer or prior to the exercise of the claimant's option to bring suit under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duty authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the Department shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not ac-

crue until six months after the filing of an amendment.

STATEMENT OF THE CASE

A. Proceedings Before the Department of Health and Human Resources

Petitioners' infant daughter was injured on December 15, 1987 as a result of alleged malpractice and negligence on the part of government employees in the course of their duties with the Indian Health Service Hospital in Shiprock, New Mexico. That hospital is operated by the Department of Health and Human Services (hereinafter "Department"). Petitioner Angela Lee filed a claim on behalf of her daughter, Georgia Ann Lee, with the Department on August 8, 1989. That administrative claim set forth the incident alleged to have involved tortious conduct by government employees at the hospital and placed a value on the claim. Although the Department had not acted on that claim within six months of its filing, petitioner Angela Lee did not exercise her option under 28 U.S.C. § 2675(a) to file suit against the Government at that time—an action that would have terminated the administrative process established by § 2675(a).

On December 11, 1990, an amendment to the original claim was transmitted to the Department by petitioners. The amendment identified specific injuries suffered by petitioners on account and arising out of the tortious conduct identified in the original claim. Petitioners' personal injuries arise from negligent infliction of emotional distress under New Mexico law allegedly suffered by petitioner Angela Lee, who witnessed her daughter go into cardiac arrest as a result of an allegedly massive overdose of Dilantin. The as-

serted damages include medical expenses, loss of income, and other costs arising out of the special care their daughter required after her resuscitation and treatment because of the brain damage and developmental retardation arising from the alleged overdose and the daughter's cardiac arrest—all damages recoverable under New Mexico Law. To some extent, the specific damages identified in petitioners' amendment overlapped damages identified in the original claim; thus, while the amount of the total claim was raised by the amendment, the amount of the claim attributed to the daughter was correspondingly reduced, consistently with New Mexico law, to reflect this overlap.[1]

The original claim was still pending before the Department when petitioners' amendment was received by the Department on December 17, 1990. The Department, treating petitioners' amendment to the original claim as separate claims, purported to deny the "claims" of petitioners by letter dated December 20, 1990. The asserted ground for denial was that the "claims" were barred by the two-year limitations period contained in 28 U.S.C. § 2401(b). App., *infra*, at 11a.

B. Proceedings in the District Court

Petitioners initiated this action by filing a complaint in the United States District Court for the District of New Mexico on June 20, 1991.[2] The United States

---

[1] The daughter's claim was subsequently amended to raise substantially upward the damages suffered and to be incurred.

[2] In the December 20, 1990 letter from the Department, petitioners were expressly informed that "[i]f you are dissatisfied with this determination you are entitled to file suit in the ap-

moved to dismiss the complaint for lack of jurisdiction, arguing that any recovery by petitioners was jurisdictionally barred because the amendment to the original claim had not been presented to the Department within two years of the accrual of the original claim. Petitioners countered that the damages sought in the amended claim were not barred because the amendment was filed while the original claim was pending within the Department and should be deemed to relate back to the indisputably timely original claim.

In support of their position, petitioners relied primarily on *Avila* v. *Immigration and Naturalization Service*, 731 F.2d 616 (9th Cir. 1984), a case factually indistinguishable from the case at bar. In *Avila*, the Ninth Circuit held that an amendment of a child's claim to add a related claim by a parent relates back to the original claim for purposes of applying the two-year limitations period of § 2401(b).

The District Court in the case at bar, in the absence of any Tenth Circuit law on point, expressly conceded the force of petitioners' reliance on *Avila* but nevertheless refused to adopt *Avila*. The court stated, "I . . . decline to follow [*Avila*]." App., *infra*, at 8a. Rather than following *Avila*, the District Court chose

---

propriate court within six months after the date of this final determination." Under 28 U.S.C. § 2401(b), petitioners were required to file an action to challenge the Department's determination in federal district court by June 20, 1991—six months after the administrative determination. At that time, the original claim remained pending before the Department. On November 14, 1992, the Department finally denied the original claim, and on November 16, 1992, the daughter filed an action to recover on that claim. That action is pending in the United States District Court for the District of New Mexico, No. CIV-92-1327-JC.

instead to follow the contrary decision of the Eighth Circuit in *Manko* v. *United States*, 840 F.2d 831 (8th Cir. 1987). Noting that the opinion in *Manko* "criticized" the decision in *Avila* and that no reported cases had followed *Avila*, the District Court concluded that "[o]f the two [decisions], I find that *Manko* is the better reasoned opinion. I decline to follow *Avila* for the same reasons expressed in the *Manko* opinion." App., *infra*, at 7a-8a.

C. Proceedings in the Court of Appeals

On appeal, the Tenth Circuit noted the District Court's rejection of *Avila* and its adoption of *Manko* and decided to "affirm the order of the district court for substantially the same reasons set forth in the district court's" opinion. App., *infra*, at 4a. According to the Court of Appeals, "an amendment adding new claimants and claims outside the limitations period of the FTCA would defeat the basic purpose of the limitations period, " 'which is to encourage the prompt presentation of claims.' " App., *infra*, at 4a (quoting the opinion of the District Court, in turn quoting *United States* v. *Kubrick*, 444 U.S. 111, 117-18 (1979)).

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit's Decision and Judgment Present a Clear Conflict with the Ninth Circuit's Decision and Judgment in *Avila* v. *United States*

As the Court is aware, claims (and litigation) brought pursuant to the FTCA are voluminous. When inter-circuit conflicts arise over the proper interpretation of provisions of the FTCA that are implicated in virtually every claim that may be pursued against the Government under that statute, the Court has been quick to recognize the need to resolve such con-

flicts because swift resolution of such conflicts will substantially promote the efficient disposition, through settlement or litigation, of the many pending and potential cases that may be affected. *See, e.g., McNeil* v. *United States*, No. 92-6033 (*cert. granted*, January 15, 1993) (inter-circuit conflict regarding proper interpretation of 28 U.S.C. § 2675).

The inter-circuit conflict presented by this petition could not be clearer. In ruling against petitioners' contention that their amendment could not relate back to the timely claim filed on behalf of their injured child, the Tenth Circuit, as had the District Court, expressly rejected the reasoning of the Ninth Circuit in *Avila* and expressly adopted the reasoning of the Eighth Circuit in *Manko*. Were there any doubt regarding the irreconcilability of those decisions, that doubt is decisively put to rest by comparison of these cases.

In *Avila*, a timely claim was brought by a father on behalf of his incompetent son. The father attempted to recover for his own injuries arising out of the injuries to his son by amending his son's claim, which was still pending before the INS. The INS rejected the father's attempt to amend the original claim because the amendment had not been presented to the INS within the two-year limitations period. The District Court agreed with the INS.

On appeal, the Ninth Circuit reversed. In its opinion, the Ninth Circuit initially observed that in requiring exhaustion of administrative remedies, 28 U.S.C. § 2675 did not, on its face, preclude amendment of a timely filed claim. 731 F.2d, at 620. The court went on to note that in fact the pertinent regulation, 28 C.F.R. § 14.2(c)—which is identical in per-

tinent respects to the HHS regulation, 45 C.F.R. § 35.2, involved in this case, expressly provided for the amendment of claims "at any time prior to final agency action." 731 F.2d, at 620.

Having established the context in which the plaintiff's relation-back argument arose, the Ninth Circuit—reasoning by analogy to the standards governing amendment of complaints filed in federal district courts, specifically Fed. R. Civ. P. 15(c)—concluded that the amendment at issue should be allowed because the son's claim gave adequate "notice to the opposing party [the INS] of the existence and involvement of the new [claimant]" and that, "under the circumstances of this case no prejudice would accrue to the government from allowing [the] amendment to relate back to the original claim." As the court put the matter, the nature of the damages claimed by the parent was such "that the government would reasonably expect to" incur those damages given their relationship to the son's claim. 731 F.2d, at 620.

Subsequently, the Eighth Circuit in *Manko* expressly rejected the reasoning of the Ninth Circuit in *Avila*. In *Manko*, the wife of a person who had been injured as a result of receiving a swine-flu shot attempted to recover damages she alleged to have suffered for loss of consortium arising out of injuries to her spouse. That attempt came after the two-year limitations period of § 2401(b) had run. The Eighth Circuit, affirming the District Court's refusal to entertain the claim for loss of consortium, wrote in pertinent part as follows:

> The last case, *Avila*, is in point for Mrs. Manko's argument. There the Court permit-

> ted a father to amend his son's claim, after the two-years had run, to add his own claim for damages arising out of his son's claim. The [Ninth Circuit] reasoned, "[The son's] claim, and the accompanying letter, identified Jesus as Daniel's father and explained Daniel's disability. The nature of Jesus's damages was such that the government would reasonably expect to occur from its wrongful deportation of a mentally impaired citizen." 731 F.2d at 620.
>
> Setting aside the fact that Mrs. Manko filed a new claim rather than an amendment to her husband's claim, *if we followed Avila*, it would lead to the result Mrs. Manko seeks. *The government does not attempt to distinguish Avila on its facts, nor do we think it could do so successfully. But we decline to follow Avila. We disagree with its reasoning.*

830 F.2d, at 841 (emphasis added).

Although written broadly, *Manko* is arguably distinguishable from *Avila*. The spouse in *Manko* did not seek recovery of damages for loss of consortium before the federal agency involved until after her husband's administrative claim had been denied by the agency. Thus, *Manko* could have been decided on the narrower ground that the spouse's claim was barred because it was made neither during the pendency of the original claim before the agency nor during the applicable two-year period. The *Manko* court, however, chose not to rest its decision on that ground, and subsequent cases in the Eighth Circuit are governed by the reasoning of *Manko*. Thus, for purposes

of the existence of an inter-circuit conflict, *Manko* must be regarded as conflicting with *Avila*.

Even if *Manko* and *Avila* could be reconciled, however, the Tenth Circuit's decision in this case creates a square conflict with the Ninth Circuit's decision in *Avila*. The facts of this case and those in *Avila* are indistinguishable. In both cases, the parent (or parents) of a minor or incompetent child, injured by the alleged malfeasance of the Government, attempted to add related claims on their own behalf by amending the timely original claim while that claim was pending before the administrative agency, but after the applicable limitations period for filing the original claim had run. The Ninth Circuit in *Avila* allowed the amendment, holding that it related back to the original claim. The Tenth Circuit in this case, by contrast, held that the amendment was barred by § 2401(b). In so doing, the Tenth Circuit expressly rejected the reasoning of the Ninth Circuit in *Avila* and adopted that of the Eighth Circuit in *Manko*. Thus, no artifice could dissipate the conflict between *Avila*, on the one hand,[3] and the decision in the case at bar in which the Tenth Circuit adopted the reasoning of *Manko*.

---

[3] In the Tenth Circuit, the Government purported to distinguish *Avila* by arguing "that the administrative claim [in *Avila*] may have been poorly handled by the federal agency and this factor may well have influenced the [*Avila*] court's decision." Br. for United States, at 16. Not even the Tenth Circuit was prepared in this case to accept such a transparently facile argument. Furthermore and as discussed *infra*, the principle of law espoused and applied by *Avila* had already been established in the Ninth Circuit in *Avery* v. *United States*, 680 F.2d 608 (9th Cir. 1982), and has been adopted in other circuits, including the Third, Fifth and Sixth Circuits.

B. The Inter-circuit Conflict Involves a Substantial Point of Law That This Court Would Most Probably Conclude Was Wrongly Decided by the Tenth Circuit

The questions presented by this petition are manifestly substantial, going as they do to the heart of how the administrative processing of claims against the Government pursuant to the FTCA are to be presented and how such claims are to be litigated in the absence of settlement. These are not trivial issues. As illustrated by the case at bar, *Manko* and *Avila*, many States provide that persons not the immediate objects of tortious conduct may recover damages personal to them arising out of the same transaction or occurrence. Congress has made this state law applicable to FTCA claims.

The issue here is not whether Congress has waived the Government's immunity from such claims; Congress clearly did so in the FTCA itself. Rather, the issue here is whether the Executive, shorn of its immunity for such tortious conduct by Congress, can nevertheless avoid liability by virtue of a textually insupportable reading of § 2401(b) calculated to take unfair advantage of claims and pleadings that, in many instances, may be filed *pro se* by the injured person or a family member. As the D.C. Circuit has put the matter, the FTCA's "goal of just compensation is not advanced by refusing to allow unknowledgeable claimants to amend their claims and seek *all* their damages when they failed, through ignorance of technical governmental procedures, to request their full damages in their original claim." *Odin* v. *United States*, 656 F.2d 798, 805 (D.C. Cir. 1981) (emphasis in original).

Moreover, the reasoning of *Manko* is, at best, dubious. As discussed in *Manko*, prior to the 1966 amendments to the FTCA, claims against the Government in excess of $2,500 were not subject to any administrative exhaustion requirement. 830 F.2d, at 840. Thus, prior to those amendments the claims in the case at bar, *Manko* and *Avila* were all required to be brought directly in federal district court. At that time, the two-year limitations period of § 2401 applied and any attempt to amend a timely filed complaint after the two-year limitations period had run was subject to evaluation under Fed. R. Civ. P. 15(c).

In *Manko*, the Eight Circuit concluded, without analysis and without pointing to any supporting language in § 2401(b) or elsewhere in the FTCA, "that Fed. R. Civ. P. 15(c) does not apply to this issue. Rule 15(c) applies only to relation back of amendments to pleadings in ordinary lawsuits; the current issue does not arise in such a setting." 830 F.2d, at 840. Although the Eighth Circuit's quoted assertions may be, in a technical sense, correct, those assertions essentially beg two questions. First, even though Rule 15(c) might not be technically applicable to the unusual "administrative" proceeding created by § 2675(a), why does Rule 15(c) not furnish an appropriate analogue that could be looked to in interpreting the statutory scheme created by Congress in 1966? Second, if the standards of Rule 15(c) are not to be consulted to resolve the question, to what superior source of law is a federal court to look to fashion a rule for answering the question presented?

The Eighth Circuit's opinion does virtually nothing to explain the source of its rule, a rule that departs substantially from the requirements of Rule 15(c). In

other words, the Eighth Circuit's summary rejection of *Avila*'s resolution of the issue by analogy to Rule 15(c) required it to look elsewhere for a rule, but no other source for its rule can be found in the FTCA, so the Eighth Circuit fabricated its own rule essentially out of whole cloth.

Necessarily implicit in the Eighth Circuit's analysis is that in the course of imposing an administrative exhaustion requirement on FTCA claims over $2,500 in 1966, Congress simultaneously withdrew the existing right of FTCA claimants to amend their claims after the expiration of the two-year limitations period where the claim asserted in the proposed amendment arose out of the conduct, transaction, or occurrence set forth in the original claim and where the Government was not unfairly prejudiced by amendment. But there is no indication in the text of § 2401(b), § 2675, or any other provision of the FTCA that supports that position. Nor does logic. Nor do agency regulations adopted pursuant to the FTCA, such as 45 C.F.R. § 35.2, that freely authorize amendment of FTCA claims pending in federal agencies prior to final agency decision but which give no warning to claimants of the trap that has been created for all claimants by the litigating position taken by the Government in this and other similar cases.

Furthermore, absent express language in the FTCA compelling the result reached in this case and *Manko*, that result cannot be reconciled with the overall purpose of the 1966 amendments, that "of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." S. Rep. No. 1327, 89th Cong., 2d Sess.

5 (1966). Petitioners recognize the duty of the Executive and its attorneys to conserve the public fisc. That duty, however, has been converted by the Executive in this and other similar cases into a license to engage in the very kind of sharp settlement and litigation practices that petitioners and similarly situated persons have a right not to expect from "their Government." Congress gave them that right, and the Executive cannot unilaterally take away what Congress has given.

The reasoning of the Eighth Circuit and the position of the Government in these cases appear to rest on the suggestion, as expressed in *Manko*, that

> the result in *Avila* is at odds with the congressional purpose underlying § 2401(b) because . . . amendments which add new claims or increase the amount of damages sought change the government's settlement calculus.

This suggestion is incorrect for a number of reasons, the chief of which is that there is no "source" in the text of the FTCA for this alleged "congressional purpose" to avoid a "change [in] the government's settlement calculus." In fact, under the FTCA all claimants, including petitioners, have an *absolute*, *unilateral* right to file a claim and simultaneously tell the federal agency involved that they will not even entertain a settlement offer from the Government that is for less than their claim. *See Odin*, 656 F.2d, at 804-05. One general "purpose" of the 1966 amendments requiring exhaustion of administrative "remedies" created by those amendments was to encourage settlement of claims prior to litigation. Congress,

however, put absolutely no teeth into that "purpose" sufficient to support the Government's position in this and other similar cases.

In making this "purpose" argument, the Government confuses and merges the objective of providing an opportunity for voluntary settlement of claims with the notice requirements of § 2675. Congress legislated the latter; it only created an opportunity for the former. As this Court stated succinctly in *Train* v. *City of New York*, 420 U.S. 35, 45 (1975) (White, J.), "legislative intention, without more, is not legislation."

Indeed, to the extent that the Tenth and Eighth Circuits rely on this "purpose" argument, their rationale and the results yielded by that rationale create a square conflict with the decision of the Fifth Circuit in *Adams* v. *United States*, 615 F.2d 284 (5th Cir. 1980). In *Adams*, the Government argued that a claimant's failure to provide an agency claims officer with certain information that would permit the Government to calculate the value of the claim violated a regulation purportedly based on 28 U.S.C. § 2675 and therefore precluded the claimant from pursuing that claim in federal court. The Government also relied on 28 U.S.C. § 2672, which addresses issues of agency settlement and adjustment of properly presented claims.

The Fifth Circuit flatly rejected the Government's arguments that noncompliance by a claimant with the gloss placed on § 2675 and § 2672 by the Government in a regulation could strip federal courts of jurisdiction over tort claims. Under § 2675, according to the Fifth Circuit, all the claimant is required to do is (1) to give the agency "written notice of his or her claim sufficient to enable the agency to investigate" and,

(2) to "place[] a value on his or her claim." 615 F.2d, at 289. As for the settlement process established by § 2672, that court squarely held that"[n]oncompliance with section 2672 deprives a claimant only of the opportunity to settle his or her claim outside the courts." *Id.*, at 290. In this case, petitioners complied with the statutory requirements actually legislated by Congress.[4] As the Fifth Circuit stated in *Adams*, the notice requirement of § 2675 "is frustrated when the distinct functions of presenting notice and of engaging in settlement are confused in a way that impermissibly redefines the section 2675 notice requirement." 615 F.2d, at 288.

Adams is not alone in its holding that the purpose of Congress to encourage settlements says nothing about nor adds to the "minimal notice" requirements imposed by § 2675(a). *Warren* v. *U.S. Department of the Interior*, 724 F.2d 776, 779 (9th Cir. 1984) (*en banc*) (citing and relying on *Adams*). In *Tucker* v. *United States Postal Service*, 676 F.2d 954, 957-59 (3d Cir. 1982), the Third Circuit positioned itself squarely with *Adams* on this point. And in *Douglas* v. *United States*, 658 F.2d 445, 447-48 (6th Cir. 1981), the Sixth Circuit expressly adopted the rationale of *Adams*.

The Government has, in this and other cases, attempted to transmute § 2675(a)'s requirement of minimal notice into a set of complex requirements, the

---

[4] As *Odin* v. *United States*, 656 F.2d 798 (D.C. Cir. 1981), holds, a claim initially filed for a sum certain may be amended to increase the amount of the claim. To the extent that the Government would argue the contrary position in this Court, the Government would only point up yet another inter-circuit conflict.

violation of any one of which is then argued by the Government to preclude federal jurisdiction over the tort claim. The Government's attempts to do so have, for the most part, been rebuffed by the Courts of Appeals. Petitioner Angela Lee filed a claim for her daughter that identified the event giving rise to the claim and placed a money value on that claim. That she was required to do no more in order for that claim to encompass—if not render totally unnecessary—the subsequent amendment is best captured by the analysis of then-Judge Kennedy in *Avery* v. *United States*, 680 F.2d 608 (9th Cir. 1982).

In *Avery*, as in *Adams*, the Government insisted that the failure of two FTCA plaintiffs to provide sufficient information to the federal agencies involved at the administrative stage deprived the federal courts of jurisdiction over their claims. Judge Kennedy first noted that in prescribing the scope of the notice required to be given to the federal agency involved, Congress relied on models governing tort claims against municipalities and that Congress had relied on McQuillan's *Municipal Corporations* as a primary source of its understanding. Judge Kennedy then went on to quote that treatise as follows:

> In claims for damages for injury to persons or property the usual requirement is that the notice or statement shall contain a *brief general description of the time, place, cause and general nature of the injury, and often the amount of compensation* or other relief demanded. (Emphasis added)

17 *McQuillan, Municipal Corporations* § 4807 (3d ed. 1968) at 89-90.

680 F.2d, at 611. If Judge Kennedy's view of the notice requirement of § 2675(a) is correct, it is probable that the original claim filed by Angela Lee for her daughter gave sufficient notice to the Government to encompass the injuries to petitioners that petitioners subsequently identified *with greater precision than was required by § 2675(a)* by submission of their amendment to the original claim.[5] However that may be, it is manifest that § 2401(b) cannot be read to preclude petitioners' action where they sought, by amendment, to give more complete information to the Department while the original claim was pending before the Department.

CONCLUSION

In addition to the square, expressly acknowledged conflict between the decision below and the decision in *Avila*, it is manifest that the various rationales offered by the Government to support and secure the result reached by the Tenth Circuit in this case have been repudiated by and are in conflict with decisions in other cases, including the Fifth Circuit's decision in *Adams* v. *United States*. Certiorari should be granted to resolve these conflicts and bring order to

---

[5] Petitioners expressly argued in the court below that the original claim put "the Government . . . on notice that it would have to defend or settle claims arising out of the Dilantin overdose administered to Georgia Ann Lee. This satisfied the purpose of the statute of limitations for all claims arising out of the Dilantin overdose . . . ." Reply Br. of Plaintiffs-Appellants, at 12.

the administrative consideration and litigation of claims brought under the FTCA.

February 23, 1993 Respectfully submitted,

*LARRY L. SIMMS
BRADFORD R. CLARK
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8558

JOHN R. WESTERMAN
TODD M. ACKLEY
LAW OFFICES OF JOHN R.
WESTERMAN, CHARTERED
2901 East 20th Street
Farmington, New Mexico 87402
(505) 327-3737

Attorneys for Petitioners

**Counsel of Record*

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 92-2061

ROBERT LEE and ANGELA LEE,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

FILED

United States Court of Appeals
Tenth Circuit

NOV 25 1992

ROBERT L. HOECKER
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 91-0631-M)

Submitted on the briefs:

John R. Westerman and Todd M. Ackley of the Law Offices of John R. Westerman, Chartered, Farmington, New Mexico, for Plaintiffs-Appellants.

Don J. Svet, United States Attorney, Marilyn S. Johnson, Assistant United States Attorney, Albuquerque, New Mex-

ico, Virginia R. Mitz, Attorney, Office of General Counsel, United States Department of Health and Human Services, Washington, D.C., for Defendant-Appellee.

Before MOORE and TACHA, Circuit Judges, and SAFFELS,** Senior District Judge.

MOORE, Circuit Judge.

Plaintiffs Angela and Robert Lee are the parents of the minor child, Georgia Ann Lee. On December 15, 1987, the child allegedly received negligent medical treatment at the Indian Health Service Hospital in Shiprock, Arizona. On July 31, 1989, plaintiff Angela Lee presented a claim for damages to the Department of Health and Human Services (DHHS) on behalf of her daughter. By letter to the DHHS dated December 11, 1990, plaintiffs attempted to amend the administrative claim to add themselves as parties and to add their own claims. The DHHS denied the amendment as outside the two-year statute of limitations in 28 U.S.C. § 2401(b). Plaintiffs submitted to DHHS a second amended administrative claim dated April 13, 1991, which also was denied.

Plaintiffs then brought this suit asserting their claims for damages against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), and 2671-2680. The district court dismissed plaintiffs' complaint for lack of

---

**Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

subject matter jurisdiction. Plaintiffs appeal.[1] We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

We review a dismissal for lack of jurisdiction de novo. *Redmon ex rel. Redmon v. United States*, 934 F.2d 1151, 1155 (10th Cir. 1991). Plaintiffs make the same two arguments on appeal as before the district court. First, they argue that the amendment to their daughter's administrative claim "relates back" to the original claim, if not for both plaintiffs, then at least for Angela Lee, whose name appeared on the claim as mother and guardian of Georgia Ann Lee. Second, plaintiffs argue that 28 C.F.R. 14(c) allows administrative claims to be amended before final disposition, and since the government was on notice of the incident which allegedly gave rise to these tort claims, the amendment should be allowed.

The district court carefully considered plaintiffs' arguments. In its Memorandum Opinion and Order entered February 12, 1992, the district court determined that the amended claims did not "relate back" to the original claim because the original claim for the child did not put the government on notice of the fact, nature, or amount of the parents' claims. There being no Tenth Circuit decisions on the point, the court relied on the Eighth Circuit's reasoning in *Manko v. United States*, 830 F.2d 831, 841-42 (8th Cir. 1987) (deciding amendment could not "relate back" because § 2401(b) waiver of sovereign immunity must be strictly construed), which it considered to be more sound than that of the Ninth Circuit's decision in *Avila v. INS*, 731 F.2d 616, 620 (9th Cir. 1984) (holding untimely amendment "related back" because father's name on original

---

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

claim for incompetent son put government on notice of father as potential additional claimant).

The district court further determined that although 28 C.F.R. § 14.2(c) allows amendment of an administrative claim prior to final disposition, an amendment adding new claimants and claims outside the limitations period of the FTCA would defeat the basic purpose of the limitations period, " 'which is to encourage the prompt presentation of claims.' " Memorandum Opinion and Order at 3-4 (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)). The district court therefore concluded it lacked subject matter jurisdiction under the FTCA to consider plaintiffs' claims.

The district court's discussion of the issues was thorough and well-reasoned. We have also considered plaintiffs' arguments carefully and affirm the order of the district court for substantially the same reasons set forth in the district court's Memorandum Opinion and Order entered February 12, 1992, a copy of which is attached.

The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 91-631-M Civil

ROBERT LEE and ANGELA LEE,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

FEB 12 1992

Robert M. March
CLERK

MEMORANDUM OPINION AND ORDER

This matter came on for consideration on the motion of defendant to dismiss. Having considered the motion, the response, and reply thereto, and being otherwise fully advised in the premises, I find the motion is well taken and it shall be granted.

Background

This is an action against the United States government brought pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) and 2671 *et seq.* The United States moves to dismiss this action for lack of subject matter

jurisdiction, arguing that the plaintiffs have failed to file a timely administrative claim.

The incident upon which plaintiffs Angela and Robert H. Lee base their claim occurred on December 15, 1987. Their claim concerns the medical treatment of plaintiffs' daughter Georgia Ann Lee at the Public Health Service Indian Hospital in Shiprock, New Mexico. Angela Lee filed the original administrative claim for her daughter Georgia Ann Lee on or about August 8, 1989. On or about December 11, 1990, an amended complaint for damages, injury or death was filed. The amended claim, among other things, added claims for Angela Lee and Robert H. Lee as parents of Georgia Ann Lee. On December 20, 1990, the parents' claims were denied by letter for being time-barred pursuant to 28 U.S.C. § 2401 and 28 C.F.R. § 14.2(a). The Lees brought this lawsuit because of the failure of the administrative agency to allow their claims. Defendant's motion to dismiss and this opinion do not deal with the claims filed by Angela Lee on behalf of Georgia Ann Lee.

Discussion

As a sovereign, the United States "is immune from suit save as it consents to be sued [citations omitted] and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586 (1941). The United States has consented to suit under the provisions of the FTCA, 28 U.S.C. § 1346(b). For this reason, compliance with the FTCA time requirements are jurisdictional. *Houston v. U.S. Postal Services,* 823 F.2d 896, 902 (5th Cir. 1987).

Section 28 U.S.C. 2401(b) provides that:

> [a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action

> is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The plaintiffs do not dispute the fact that the amended complaint was filed two years after the incident. They argue, however, that the amendments should be allowed pursuant to 28 C.F.R. § 14.2(c). They also argue that the amended claim should relate back to the original complaint brought by the parents on behalf of Georgia Ann Lee.

28 C.F.R. § 14.2(c) states in pertinent part that "[a] claim presented in compliance with ¶(a) of this section may be amended by the claimant at any time prior to the final agency action . . . ." Plaintiffs argue, and the United States agrees, that there was no final agency disposition of the original claim at the time the claim was amended. However, the United States argues that even though the regulation allows amendment of the claim prior to a final disposition, an amendment cannot be made adding new parties alleging an entirely new set of injuries and damages. I agree.

The regulation makes no mention of amending the complaint to add new parties. The claims of Angela and Robert H. Lee were brought three years after the incident giving rise to the claim. In *United States v. Kubrick,* 444 U.S. 111, 117-18 (1979) the Supreme Court stated that "[s]ection 2401(b) . . . is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose which is to encourage the prompt presentation of claims . . ." Allowing plaintiffs to amend the complaint that would add two new parties three years after the claim accrued would defeat that purpose.

Plaintiffs correctly state that *Avila v. INS,* 731 F.2d 616 (9th Cir. 1984) supports their position. However, that opinion has been criticized in *Manko v. United States,* 830 F.2d

831 (8th Cir. 1987) and I, likewise, decline to follow it. Further, I find no reported cases citing *Avila* for the proposition that new parties and claims may be added before an administrative decision in an amended complaint after the two-year period has run.

Plaintiffs also argue, citing *Avila,* that the amended claim should relate back to the original claim because the injuries arise from the same occupational circumstances and the government was put on constructive notice that Georgia Ann's parents would incur recoverable losses. The United Stats relies upon the *Manko* case. There are no Tenth Circuit opinions on this issue. Of the two, I find that *Manko* is the better reasoned opinion. I decline to follow *Avila* for the same reasons explained in the *Manko* opinion.

In *Manko,* an administrative claim was made by a man injured by the Swine Flu Vaccine. The injured man's wife sought damages for loss of consortium at the time the suit was brought to the district court. The district court denied her claim because it had not been brought to the appropriate administrative agency. Mrs. Manko then filed a new claim with the administrative agency and this claim was denied. The husband then attempted to amend the administrative complaint naming the wife as co-plaintiff in order to have it relate back to the date of the original filing. This claim was also denied. *Id.* at 838-39.

In *Manko,* the husband and wife argued that the husband's claim served as adequate notice of Mrs. Manko's claim. The court looked to the legislative history of the act and determined that Congress intended to create a system by which an administrative agency could resolve "specific claims for specific amounts of money." *Id.* at 840. The *Manko* court stated that in keeping with the purpose of the limitations statute "reasonably diligent presentation of tort claims against the government" is required. *Id.* at 840 quoting *Kubrick,* 444 U.S. at 123 (f.n.

omitted). Thus, the court rejected the Manko's argument. Although the court recognized that the description of the injuries may have suggested that the wife could have a claim, the court found that the husband's claim did not notify the government that the wife was also a claimant or the amount of her claim. The court held that this was insufficient.

The *Manko* court stated that:

> amendments which add new claims or increase the amount of damages sought change the government settlement calculus. Section 2401(b) permits such changes for up to two years after the claim accrues, but after that time, we think that Congress intended all claims already submitted to become final in their material respects. Allowing material changes in claims after that period would severely disrupt the settlement process. Our conclusion also accords with the fact that Section 2401(b) is a condition of waiver of the sovereign immunity of the United States and we must strictly construe the statute to avoid extending the waiver.

Manko, 830 F.2d at 841-42.

The same reasoning holds true in this case. Although the agency may have been aware that the parents of George Ann Lee could have a claim, this cannot be construed as a "reasonably diligent presentation of a tort claim against the government." *Kubrick,* 444 F.2d at 133. The original claim did not notify the government of the nature of the parents' claim, the amount of the parents' claim, or that the parents were claimants in their own rights. Allowing the parents' amended complaint in this case would, therefore, violate congressional intent to create a system for administrative agencies dealing with specific claims. For all these reasons, the parents' claim cannot relate back to the original claim.

Finally, I recognize this determination disposes of what may have been valid claims of the parents. I do not understand why plaintiffs' attorney presented these claims so late. However, because the claim of Angela Lee and Robert H. Lee was not made in compliance with the statute, I must grant defendant's motion to dismiss for lack of subject matter jurisdiction.

IT IS SO ORDERED.

/s/ ?????
SENIOR UNITED STATES DISTRICT JUDGE

ATTORNEYS

For Plaintiffs:
John R. Westerman
Attorney at Law
2901 E. 20th Street
Farmington, N.M. 87402

Business and Administrative Law
Rm. 5362 Cohen Bldg.
330 Independence Ave., S.W.
Washington, D.C. 20201

CERTIFIED—RETURN
RECEIPT REQUESTED

John R. Westerman, Esquire
2901 E. 20th Street
Farmington, New Mexico 87402

Re: "Amended" claim of Georgia Ann Lee

Dear Mr. Westerman:

I have reviewed the letter addressed to Virginia Mitz of my staff which included an "Amended" claim in the matter of Georgia Ann Lee. The enclosure is not an amendment to the claim filed on behalf of Georgia Ann Lee. 28 C.F.R. § 14.2(c). It is a new claim filed by Angela Lee and Robert H. Lee for themselves. The only amendment to the claim of Georgia Ann Lee is the reduction in compensatory damages from $3,000,000.00 to $2,500,000.00. Since the incident occurred on December 15, 1987, a claim filed by Angela Lee and Robert H. Lee received on December 13, 1990 is well beyond the two year statute of limitations for filing a claim under the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2401(b), 28 C.F.R. § 14.2(a).

The claim of Angela Lee and Robert H. Lee is hereby denied. If you are dissatisfied with this determination you are entitled to file suit in the appropriate federal district court within six months after the date of this final determination.

I suggest that it is time to give serious consideration to a structured settlement for the benefit of Georgia Ann Lee for whom a claim was timely filed. After you have discussed this with Angela Lee please be in touch with Ms. Mitz. She would appreciate any information you wish to provide that will assist in reaching a reasonable compromise settlement.

Sincerely,

/s/ Timothy M. White
Timothy M. White, Chief
Litigation Branch
Business and Administrative
Law Division

Supreme Court, U.S.

No. 92-1390

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT LEE AND ANGELA LEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

MARK B. STERN
SUSHMA SONI
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether Section 2401(b) of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), which requires a claimant to present his or her claim to the appropriate federal agency within two years after the claim accrues, bars petitioners from amending their daughter's administrative claim, three years after the government's allegedly tortious conduct occurred, in order to add themselves as parties and to assert claims on their own behalf.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Adams v. *United States*, 615 F.2d 284 (5th Cir. 1980)	8
Avery v. *United States*, 680 F.2d 608 (9th Cir. 1982)	8
Avila v. *INS*, 731 F.2d 616 (9th Cir. 1984)	3, 6
Douglas v. *United States*, 658 F.2d 445 (6th Cir. 1981)	8
Leachman v. *Beech Aircraft Corp.*, 694 F.2d 1301 (D.C. Cir. 1982)	7
Manko v. *United States*, 830 F.2d 831 (8th Cir. 1987)	3, 5, 6, 7
McNeil v. *United States*, No. 92-6033 (May 13, 1993)	7
Tucker v. *United States Postal Serv.*, 676 F.2d 954 (3d Cir. 1982)	8
United States v. *Kubrick*, 444 U.S. 111 (1979)	3, 5
Warren v. *United States Dep't of the Interior, Bureau of Land Management*, 724 F.2d 776 (9th Cir. 1984)	8
Williams v. *United States*, 405 F.2d 234 (5th Cir. 1968)	7

Statutes, rule and regulations:

Federal Tort Claims Act:	
28 U.S.C. 1346(b)	2
28 U.S.C. 2401	2
28 U.S.C. 2401(b)	2, 3, 4, 5, 6, 7
28 U.S.C. 2671 *et seq.*	2
28 U.S.C. 2675	8

Statute, rule and regulations—Continued: Page

28 U.S.C. 2675(a) 4, 5
Fed. R. Civ. P. 15(c) 5, 6
28 C.F.R.:
Section 14.2(c) 2, 3
45 C.F.R.:
Section 35.2 4
Section 35.2(b) 2, 4

Miscellaneous:

6A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* (1990) 6

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1390

ROBERT LEE AND ANGELA LEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 980 F.2d 1337. The opinion of the district court (Pet. App. 5a-10a) is unreported, but is reproduced as an appendix to the opinion of the court of appeals at 980 F.2d 1339.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1992. The petition for a writ of certiorari was filed on February 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Georgia Ann Lee, the minor child of petitioners Robert and Angela Lee, allegedly received negligent medical treatment at the Indian Health Service Hospital in Shiprock, New Mexico, on December 15, 1987. Pet. App. 2a. On July 31, 1989, Angela Lee filed an administrative claim for damages with the Department of Health and Human Services (HHS) on behalf of her daughter. *Ibid.*

By letter dated December 11, 1990, petitioners attempted to amend their daughter's claim by adding themselves as parties and asserting claims for their own emotional distress, medical expenses, and other damages. Pet. App. 2a-3a; Pet. 4-5. On December 20, 1990, HHS denied the amendment as time-barred by 28 U.S.C. 2401(b), which requires presentation of an FTCA claim to the appropriate federal agency within two years after the claim accrues. Pet. App. 2a, 11a; Pet. 5. Petitioners made a second attempt to submit an amended administrative claim on April 13, 1991, but that claim was also denied. *Ibid.*

2. Petitioners then filed this action under the FTCA, 28 U.S.C. 1346(b), 2401, 2671 *et seq.*, arguing that their amendments should be allowed pursuant to 28 C.F.R. 14.2(c). That Justice Department regulation permits amendment of an FTCA claim "by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. § 2675(a)."[1] Pet. App. 7a.[2]

[1] Petitioners now assert that an HHS regulation, 45 C.F.R. 35.2(b), governs disposition of their claims. Pet. 3-4, 14. The HHS regulation tracks the relevant portion of the Justice Department regulation.

[2] The separate claim of petitioners' daughter is now pending in the district court. See Pet. 5-6 n.2.

The district court dismissed petitioners' suit for lack of subject matter jurisdiction because their administrative claims did not comply with 28 U.S.C. 2401(b). Pet. App. 5a-10a. The district court reasoned that although 28 C.F.R. 14.2(c) permits amendment of an administrative claim prior to final disposition by the agency, "[t]he regulation makes no mention of amending the complaint to add new parties." Pet. App. 7a. The court concluded that to allow petitioners to amend their daughter's administrative claim to add new claimants and new claims three years after the claims accrued would defeat the purpose of the FTCA's limitations period, "which is to encourage the prompt presentation of claims." *Ibid.* (quoting *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979)).

The district court also concluded that petitioners' amendment did not "relate back" to their daughter's original claim, because "[t]he original claim did not notify the government of the nature of the parents' claim, the amount of the parents' claim, or that the parents were claimants in their own rights." Pet. App. 9a. The district court rejected the contrary view of the Ninth Circuit in *Avila* v. *INS*, 731 F.2d 616 (1984), in favor of the Eighth Circuit's "better reasoned opinion" in *Manko* v. *United States*, 830 F.2d 831, 840-842 (1987), that Section 2401(b) does not permit amendment after expiration of the limitations period in order to add new claims by new parties. Pet. App. 8a.

3. The court of appeals affirmed "for substantially the same reasons" as were set forth in the district court's "thorough and well-reasoned" decision. Pet. App. 4a; see *id.* at 1a-4a. The court of appeals noted that the district court relied on the Eighth Circuit's reasoning in *Manko*, which the district court "considered to be more sound" than that of the Ninth Circuit in *Avila*. *Id.* at 3a-4a.

ARGUMENT

1. The Federal Tort Claims Act provides that "[a]n action shall not be instituted upon a claim against the United States for injury or loss of property or personal injury or death * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." 28 U.S.C. 2675(a). The Act further provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(b). Petitioners, the "claimants" before the Court, sought to bring claims on their own behalf—seeking damages for injuries that they alone had suffered—more than two years after the allegedly negligent treatment of their daughter. In an effort to circumvent the FTCA's limitations period, petitioners styled their new claims as an amendment to their daughter's claim, and then argued that the amendment "related back" to the timely filing of their daughter's claim. Because petitioners have indisputably failed to comply with the express requirements of the FTCA, however, their claims were properly rejected by the courts below.

Petitioners' claims were not an amendment to their daughter's claim, but rather were entirely new claims, seeking damages for distinct injuries that they allegedly had suffered. Petitioners' contention (Pet. 14) that their position is consistent with 45 C.F.R. 35.2 is meritless. Consistent with the wording of 28 U.S.C. 2675(a), quoted above, that regulation permits "the claimant" to amend his or her own claim at any time prior to final agency action. 45 C.F.R. 35.2(b). As the district court correctly noted, the regulation "makes no mention of amending the complaint to add new parties" (Pet. App. 7a), and it does

not, of course, vary the requirements of Sections 2401(b) and 2675(a).

This Court has observed that "Section 2401(b) * * * is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *United States* v. *Kubrick*, 444 U.S. at 117. Petitioners' attempt to present their claims after the limitations period expired would defeat that purpose and would disrupt the congressionally mandated system for ad-dressing specific claims.

Petitioners also err in arguing (Pet. 13-14) that untimely amendment of their daughter's administrative claim was permissible by way of analogy to Rule 15(c) of the Federal Rules of Civil Procedure. Contrary to petitioners' assertions, the Federal Rules of Civil Procedure do not presumptively apply to administrative proceedings—particularly where, as here, the application of such a rule would effectively undermine an explicit statutory directive. As the Eighth Circuit pointed out in rejecting a similar claim, "Rule 15(c) applies only to relation back of amendments to pleadings in ordinary lawsuits: the current issue does not arise in such a setting." *Manko*, 830 F.2d at 840.

Even if the doctrine of relation back applied to administrative claims under the FTCA, its principles offer petitioners no support here. The doctrine of relation back permits an individual to amend his original pleadings even after the limitations period has expired if "(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the

naming of the party against whom a claim is asserted." Fed. R. Civ. P. 15(c). In this case, provision (1) is unavailable because relation back is inconsistent with "the statute of limitations applicable to the action"—namely, 28 U.S.C. 2401(b). Provision (3) has no application because peti-tioners have not sought to change the party *against* whom the claim is asserted. That leaves only provision (2). But courts will not grant relation back where the opposing party has not been put on notice regarding the claim raised by an amended pleading. See 6A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1497 (1990). In the present case, "[t]he original claim did not notify the government of the nature of the parents' claim, the amount of the parents' claim, or that the parents were claimants in their own right." Pet. App. 9a. The courts below therefore correctly concluded that petitioners' claim should not relate back to their daughter's original claim. Accord *Manko*, 830 F.2d at 840 (wife's untimely claim did not relate back to husband's claim where his claim did not indicate that wife was a claimant or state the amount of her claim).[3]

2. Petitioners correctly point out that the Tenth Circuit's decision in this case and the Eighth Circuit's decision in *Manko*, 830 F.2d at 841-842, conflict with the Ninth Circuit's decision in *Avila* v. *INS*, 731 F.2d 616, 620 (1984). Nonetheless, this case does not, in our view, merit review, because the issue has arisen only infrequently in FTCA litigation. As the Eighth Circuit concluded in *Manko*, the ruling in *Avila* lacks a sound basis in the law. One of the two decisions on which

---

[3] Indeed, petitioners conceded before the court of appeals that "there is nothing in the original claim to put the Department on notice of the existence and involvement of Plaintiff Robert Lee." Pet C.A. Br. 20.

Avila relied, *Leachman* v. *Beech Aircraft Corp.*, 694 F.2d 1301, 1308-1310 (D.C. Cir. 1982), did not involve either a tort claim or 28 U.S.C. 2401(b), while the other, *Williams* v. *United States*, 405 F.2d 234 (5th Cir. 1968), was based on FTCA law prior to the 1966 amendments that required administrative exhaustion in all cases. *Manko*, 830 F.2d at 841. Moreover, in *McNeil* v. *United States*, No. 92-6033 (May 13, 1993), this Court made clear—in the specific context of a claimant's filing of his FCTA claim with the agency—that there must be "strict adherence" to the procedural requirements for institution of an FCTA suit, (slip op. 7), and that the courts "are not free to rewrite the statutory text," slip op. 5.

As the district court observed—and as petitioners do not dispute—in the nine years since *Avila* was decided, no reported case has cited it "for the proposition that new parties and claims may be added before an administrative decision in an amended complaint after the two-year period has run." Pet. App. 8a.[4] In light of the recent decisions that have chosen not to follow *Avila*, as well as this Court's recent decision in *McNeil*, there is a reasonable possibility that the Ninth Circuit would reconsider its position in an appropriate case. If it should decline to do so, and if lower court litigation on the issue should persist, there will be time enough for

[4] Contrary to petitioners' assertion that "the principle of law espoused and applied by *Avila* * * * has been adopted in other circuits, including the Third, Fifth and Sixth Circuits" (Pet. 11 n.3), the Ninth Circuit is the only court of appeals to adopt the position advanced by petitioners. Petitioners' reference to those other circuits at page 11 of their petition apparently is to the cases discussed at pages 16-18 of the petition. As we explain in note 5, *infra*, those cases involve a quite different issue of notice that is not involved in this case.

the Court to consider the question. But at this time, we do not believe review is necessary.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

MARK B. STERN
SUSHMA SONI
Attorneys

MAY 1993

[5] Petitioners err in arguing (Pet. 16-18) that a second intercircuit conflict exists based on *Adams* v. *United States*, 615 F.2d 284 (5th Cir. 1980). *Adams* held only that a federal agency could not, by regulation, expand upon the minimum notice requirements in 28 U.S.C. 2675. *Adams*, 615 F.2d at 288; see also *Tucker* v. *United States Postal Serv.*, 676 F.2d 954, 957-959 (3d Cir. 1982); *Douglas* v. *United States*, 658 F.2d 445, 447-448 (6th Cir. 1981); *Warren* v. *United States Dep't of the Interior, Bureau of Land Management*, 724 F.2d 776, 779-780 (9th Cir. 1984) (en banc); *Avery* v. *United States*, 680 F.2d 608, 610-611 (9th Cir. 1982). That holding is irrelevant to this case because: (1) as the district court noted (Pet. App. 9a), the original claim failed to provide *any* notice of petitioners' own injuries and damages sought, and (2) there is no question of the adequacy of the original administrative filing to present the claim of petitioners' daughter.

Supreme Court, U.S.
FILED
MAY 26 1993
OFFICE OF THE CLERK

No. 92-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT LEE AND ANGELA LEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY MEMORANDUM

*LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8558

JOHN R. WESTERMAN
TODD M. ACKLEY
LAW OFFICES OF JOHN R. WESTERMAN, Chartered
2901 East 20th Street
Farmington, New Mexico 87402
(505) 327-3737

Attorneys for Petitioners

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

REPLY MEMORANDUM

The Government, conceding as it must the existence of a square conflict between the decision below and the Ninth Circuit's decision in *Avila* v. *Immigration and Naturalization Service*, 731 F.2d 616 (9th Cir. 1984), nevertheless takes the position that review of the substantial questions presented is not "necessary." Opp. at 8. The only apparent basis for the Government's position is that it prevailed below and there is time enough for the Court to review these questions when the Government—inevitably—next fails to prevail in a court of appeals on these questions.

The administration and adjudication of thousands of claims under the FTCA, however, demands certainty and clarity if that Act is to be applied uniformly. The positions taken by the Government in its opposition establish that the conflict here runs broader and more deeply than simply the conflict between the result reached in the case at bar and *Avila*. Indeed, the Government's argument on the merits illustrates that this case present an important question as to what source of law the federal courts are to look to determine whether an amendment to a properly filed FTCA claim may be said to relate back. The text of the FTCA does not provide an express answer to that question. Furthermore, the courts below expressly adopted the rationale of *Manko* v. *United States*, 830 F.2d 831, 841 (8th Cir. 1988), that amendments that "change the government's settlement calculus" are impermissible after two years. That rationale has, however, been rejected in similar circumstances by four courts of appeals.

1. The Government argues, Opp. at 7, that the Ninth Circuit might reconsider its decision in *Avila* in light of the Court's decision last week in *McNeil* v. *United States*, No. 92-6033 (May 17, 1993). To the contrary, *McNeil* only reinforces the need for review of the case at bar. In *McNeil*, the text of the FTCA expressly addressed and, according to a unanimous Court, resolved in favor of the Government the narrow question presented in that case. In the present case, the text of the FTCA does not address *at all* the question of what rules are to govern the relation

back of amendments to properly filed claims while those claims remain pending before the appropriate federal agency. The Government asserts that "the Federal Rules of Civil Procedure do not presumptively apply to administrative proceedings," Opp. at 5, but that assertion is precisely petitioners' point. Because the FTCA does not speak to this issue expressly, the federal courts must supply a rule of procedure to be followed in literally thousands of cases.[1] The courts will do so either by manufacturing a pro-Government rule out of whole cloth, as did the courts below in this case, or by looking to the analogous Federal Rule of Civil Procedure, which provides a judicially evolved rule grounded in principles of fundamental fairness. That is where the conflict lies.

The Government presses its argument against application by analogy of Rule 15(c) by insisting that rejection of that analogy is appropriate "particularly where, as here, the application of such a rule would effectively undermine an explicit statutory directive." Opp. at 5. What "explicit statutory directive" would be "undermined" is, however, not identified by the Government. If, as the Government effectively argued below, that "directive" has to do with ensuring that the Government has before it a firm dollar figure from which settlement can be discussed, then the Government's position conflicts not only with *Avila* but with the express rationale of decisions of the Third, Fifth and Sixth Circuits cited in the Petition at 11 n.3.[2]

---

[1] The Government argues, Opp. at 6, that review of these questions is not warranted at this time "because the issue has arisen only infrequently in FTCA litigation." As discussed below, the legal principles at issue have arisen quite frequently in cases such as *Avery* v. *United States*, 680 F.2d 608 (9th Cir. 1982), and the Government has frequently failed to convince the courts of appeals of the merits of the principles it now urges on this Court. More importantly, the issue is capable of arising in every FTCA claim that is filed; all FTCA claimants and their counsel are entitled to a clear answer to these questions, as are the lower federal courts and the Government itself.

[2] The Government, Opp. at 7 n.4 & 8 n.5, purports to distinguish these cases by limiting these cases to their precise holdings. These cases, however, stand undeniably for the principle that the FTCA's

2. Petitioners do not dispute that the notice requirements of § 2675(a) must be met if their amendment is to be allowed. At the administrative level and prior to the expiration of the statute of limitations, petitioners had provided the Government with a "brief description of the time, place, cause and general nature of the injury . . . ." *Avery* v. *United States*, 680 F.2d 608, 611 (9th Cir. 1982) (Kennedy, J.) (*quoting* 17 McQuillan, *Municipal Corporations* § 4807, at 89-90 (3d ed. 1968)). Here, as in *Avery*, the Government is not entitled "to insist on proof of a claim to its satisfaction before the claimant becomes entitled to a day in court." *Id.*[3] The information provided to the Government in the original claim, without more, would have been sufficient to preclude a finding of prejudice to the Government if Rule 15(c) expressly governed the rights and obligations of petitioners and the Government. That is, of course, the heart of the matter here. Petitioners stand stripped of their claims not because the Government can show prejudice, but because the courts below applied to petitioners a rule materially more draconian than is

---

purpose of encouraging settlements may not be bootstrapped, as happened below in this case, into a rule that shields the Government from liability for torts notwithstanding that the Government was put on notice by the administrative claim of the misconduct of its agents giving rise to the claims asserted. Any suggestion by the Government that it could show actual prejudice by petitioners' delay in filing the amendment to the claim at issue would be utterly frivolous, and the Solicitor General appropriately refrains from making such an assertion.

[3] The Government's citation, Opp. at 6, to 6A C. Wright & A. Miller, *Federal Practice and Procedure* § 1497 (1990), is arguably misleading. As Professors Wright and Miller observe, if a plaintiff, by amendment, seeks to "allege an entirely different transaction," the amendment will not be allowed under Rule 15(c). *Id.*, § 1497, at 70, 73. At issue here, however, is whether "the alteration of the original statement [of the claim] is so substantial that it cannot be said that defendant was given adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim . . . ." *Id.*, at 79. The Solicitor General fails to come to grips with this principle, which governs all civil litigants in the federal court system, because it is plain that on this principle, petitioners were and are entitled to amend the original claim based upon their bringing to the federal agency involved sufficient information regarding the misconduct of the federal employees involved.

applied every day of the week to every litigant who brings or defends against a cause of action in a federal court. The Government can point to no language in the FTCA mandating such a result because there is none.

3. Review should be granted to resolve these important questions that impact the administrative processing and adjudication of thousands of cases in every circuit. The Court should decide whether, in FTCA cases, Rule 15 (c) is to be applied by analogy to govern the relation back of amendments to FTCA claims pending at the administrative stage and, if not, what rules are to govern such amendments.

May 26, 1993

Respectfully submitted,

*LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

JOHN R. WESTERMAN
TODD M. ACKLEY
LAW OFFICES OF JOHN R. WESTERMAN, Chartered
2901 East 20th Street
Farmington, New Mexico 87402
(505) 327-3737

Attorneys for Petitioners

**Counsel of Record*